FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MKB/170212

PRELIMINARY RECITALS

Pursuant to a petition filed July 31, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a hearing was held on December 16, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the petitioner is disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: No Appearance
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:
Corinne Balter
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner is a resident of Milwaukee County. He is four years old. He lives with his mother and two older siblings.

2. On March 31, 2015 the petitioner applied for the Katie Beckett waiver program.

3. On June 22, 2015 the agency sent the petitioner a notice stating that his application had been denied because he was not disabled.

4. On July 23, 2015 the petitioner requested that the DDB reconsider their denial. The DDB re-reviewed the petitioner's case, again found that the petitioner was not disabled, and denied the petitioner's application for the Katie Beckett waiver program.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children, who would otherwise be institutionalized, to receive medical assistance (MA) while living at home with their parents. Sec. 49.47(4)(c)1m, Wis. Stats. The agency is required to review Katie Beckett waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. Petitioner continues to meet this first standard. The second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. There is no need to reach this second step if the child is not disabled. (The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.)

The Department denied the petitioner's application for the Katie Becket program because the Department determined that the petitioner was not disabled. "Disability" is defined as an impairment or combination of impairments that substantially reduces a child's ability to function independently, appropriately, and effectively in an age-appropriate manner, for a continuous period of at least 12 months. Katie Beckett Program Policies and Procedures Manual, page 32. Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

> If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:
> (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
> (2) Would result in a finding that you are disabled under § 416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law.

The process of determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. The petitioner is a child, and he is not working, so he passes this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that are severe. If the impairment is a slight abnormal or a combination of slight abnormalities that cause no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). The petitioner was determined to meet this step.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in appendix 1 of subpart P of Part 404 of the regulations. The DDB found that the petitioner does not meet the listings. I reviewed listing nos. 112.10a and b for Autistic Disorder. To be eligible under this listing the child must have marked impairments in two of the following: cognitive/communicative functioning, social functioning, personal functioning, and maintenance of concentration, pace, and persistence.

A "Marked" limitation is defined in the regulations at 20 C.F.R. §416.926a(e). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). For children from ages three to age eighteen, it means "more than moderate" and "less than extreme". The regulation provides that a marked limitation "may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning."

I agree with the DDB that the petitioner does not meet or equal an autism listing. The petitioner has been diagnosed with an autism spectrum disorder. In January of 2015 a psychological evaluation was performed to assess whether or not the petitioner had an autism spectrum disorder. The examiner met with the petitioner for one and half hours. Based upon this meeting, the examiner concluded that the petitioner had moderate auditory delays, moderate gross motor delays, moderate delays in find and oral motor skills, significant delays in daily living skills, delay in toy play skills, that he does not play with other children, and is not interactive with other children, an inflexible adherence to routines, significant delays in attention and motivation, moderate delays in receptive language skills, moderate delays in expressive language, significant delay of intra-verbal skills, a difficult time understanding cause and effect, and inconsistent and erratic mood. Based upon these conclusions the psychologist found that the petitioner had mild to moderate autism spectrum disorder.

The examiner's conclusions and observations conflict with [redacted] Individualized Education Plan (IEP). The IEP states that the petitioner is cooperative, friendly, that he enjoys playing with toys and siblings, that his global language skills are age appropriate, and that he can ask and answer questions. The IEP notes an issue with the petitioner's speech. They are addressing this issue through speech therapy, however, they indicate that even with the speech issue the petitioner is able to communicate.

Many of the examiner's conclusions and observations also conflict with the petitioner's doctor records. The doctor records state that the petitioner is able to dress himself with supervision, that he uses three work sentences, that although he has some problems with running and climbing due to being knock-kneed, he can do those things. They are going to do surgery to correct his knock-kneed issue. They have some autism concerns, and refer him to an autism specialist. I agree that the petitioner has autism and some limitations related to that diagnosis. The issue is that the limitations are not nearly as severe as the psychologist and the petitioner's mother state. In order to have a marked limitation, the petitioner must be two standard deviations below the norm. This would mean that the petitioner functions worse than 95% of his peers in not one, but two categories. Both the IEP and the doctor's note show that although the petitioner has limitations, he can function in all of the categories. Even if the area of speech where he is most delayed, he can ask and answer questions. For all these reasons, I conclude that the petitioner has less than marked limitations in cognitive/communicative functioning, social functioning, personal functioning, and maintenance of concentration, pace, and persistence.

If a child does not meet or equal the Listings, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. The child must have marked impairments in two of the following six domains: (1) Acquiring and Using Information, (2) attending and completing Tasks, (3) interacting and relating with others, (4) moving about and manipulating objects, (5) caring for yourself, (6) health and physical well-being. To be found disabled, the child must have marked limitations in two of the six areas, or an extreme limitation in one of the areas. 20 C.F.R. §416.926a(b)(2).

"Marked" limitations are defined as stated above. In short, marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). In comparison, "extreme" limitation means a

score three standard deviations below the norm or, for children ages three to age eighteen, no meaningful function in a given area.

With regard to this area I find that the petitioner's limitations are less than marked in all six domains. As stated above if I were to base my findings entirely on the psychological evaluation completed in January 2015, I would find that the petitioner has marked limitations in at least two of the six functional domains. The issue is that the functioning described in this report is very different than the functioning described in the petitioner's IEP and doctor's records. I have no doubt that the petitioner has autism, and suffers some limitations due to the autism. However, it appears based upon the IEP and doctor's records that it is a very mild case of autism. The only additional service his school is providing is speech therapy. Although he needs speech therapy, he is still able to communicate. At points his mother indicates that he wants to be by himself and does not play with other kids, but at other points, she states that he sometimes wants to briefly play with other children. Given the psychological evaluation and that the petitioner needs surgery to correct that he is knock-kneed, I will conclude that the petitioner has less than marked limitations in all six functional domains. The DDB believed that the petitioner had no limitation in some areas. I disagree, I believe that the petitioner suffers some limitation in all areas, but it does not rise to the level of a marked limitation in any area.

Because I have concluded that the petitioner is not disabled, I do not need to reach the remaining steps of the Katie Becket analysis including whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR, the assessment of appropriateness of community-based care, the cost limits of community-based care, and adherence to income and asset limits for the child. Even if I were to conclude that this child was disabled, the child would still be ineligible for the Katie Becket program at the second step in the analysis. Although the disability determination is perhaps debatable, this is not a child that requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. At best he suffers from mild to moderate autism symptoms. The main service he is receiving through his IEP is speech therapy.

The petitioner currently receives medical services through the BadgerCare Program. His family is income eligible for that program. The state recently changed the approval process for autism services. Now all Medicaid recipients, which includes people covered by BadgerCare, are potentially eligible for autism services. In the past, recipients had to be on one of the autism waiver programs. This is no longer the case. If there is therapy, which is medically necessary to treat the petitioner's autism diagnosis, the petitioner's provider may file a medical prior authorization for that therapy.

CONCLUSIONS OF LAW

The petitioner is not disabled.

THEREFORE, it is **ORDERED**

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and

why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 11th day of January, 2016

\sCorinne Balter
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 11, 2016.

Milwaukee Enrollment Services
Bureau of Long-Term Support
Division of Health Care Access and Accountability